Supreme Court, U. S.
FILED
MAY 17 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975
NO. 75-1669

HARRY R. ILLMAN

Petitioner

vs.

OHIO STATE BAR ASSOCIATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

HARRY R. ILLMAN
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Toledo, Ohio 43613

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2,3
Questions Presented	2
Constitutional Provisions Involved	2
Statement of Case	2,3
Argument and Law	4-7
Reasons Why Writ Should Be Granted	7,8
Appendix A	
Judgment and Opinion of Supreme Court of Ohio	9-15
Appendix B	
Denial of Motion for Rehearing	15
Appendix C	
Governing Rule V	16
Appendix D	
Statement of Federal Question	17,18
Certificate of Service	19

CITATIONS

Cases

	Page
Argersinger v. Hamlin, 407 U.S. 25	4,6
Benson v. State Bar, 5 Cal. 3d 302	4
Brodpiece v. State Bar, 10 Cal. 3d 747, 518 p2d 337	4
Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886	6
Gideon v. Wainwright, 372 U.S. 335	4
Fuentes v. Shevin, 407 U.S. 82	6
In Re Isserman, 345 U.S. 297	7
Isserman v. Ethics Committee, 345 U.S. 927	6
In re Oliver, 333 U.S. 257	6
People v. Goldsmith, 249 N.Y. 586	7
People v. Wiel, 266 NYS 658	7
Pollard v. U.S., 352 U.S. 354	4
Powell v. Alabama, 287 U.S. 45	6
Powell v. Texas, 392 U.S. 514	6
Ex Parte Robinson, 19 Wall. 505	7
In re Ruffalo, 390 U.S. 544	6,7
In re Sachar, 347 U.S. 388	7
Selling v. Radford, 243 U.S. 46	7
Spevak v. Klein, 385 U.S. 511	6

Texts

Brickman "Of Arterial Passageways Through The Legal Process: The Right of Universal Access to Courts and Lawyering Services," 48 NYULR 595 4

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Harry R. Illman, prays for a Writ of Certiorari to review an order of The Supreme Court of Ohio entered on February 25, 1976 which permanently disbarred him from the right to practice law.

OPINION BELOW

The Opinion of The Supreme Court of Ohio by a 6 to 1 decision approving the findings of a hearing panel is found in Appendix A, pp. 10-13. A motion for rehearing was overruled on March 19, 1976 see Appendix B, pp. 15.

JURISDICTION

(1) Jurisdiction of this court is invoked under and by virtue of 28 U.S.C. 1257 (3) wherein petitioner claims he has been deprived of rights and privileges set up or claimed under the Constitution of the United States wherein petitioner claims denial of a timely request for counsel in a disciplinary proceeding or contempt action was a denial of due process.

(2) Rule 19 of this court which provides for a writ of certiorari "where a state court has a federal question of substance

not theretofore determined by this court, or had decided it in a way probably not in accord with applicable decisions of this court."

(3) Cases in support of jurisdiction are: In re *Ruffalo, Jr.* 390 U.S. 544; *Spevak v. Klein* 385 U.S. 511; *Powell v. Texas* 392 U.S. 514; *Argersinger v. Hamlin* 407 U.S. 25, *Ex parte Robinson,* 19 Wall, 505, In re *Oliver* 333 U.S. 257.

QUESTIONS PRESENTED

1. Does the denial of a timely request for counsel by an indigent in a disciplinary or contempt proceeding constitute denial of "due process of law" within the purview of the Fourteenth Amendment?
2. Is the mere preparation of an unexecuted will and a deed by a suspended attorney, acting under direction of a lawyer, conduct malum in se to warrant an order of disbarment therefor; or does such order violate "due process of law" provisions of the U. S. Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's appeal can be decided without resort to a full transcript. The salient facts are apparent from the opinion of the lower court and can be readily stipulated. The simple facts are Petitioner was suspended for a period of five years

in 1952 then indefinitely suspended in December, 1969. Certiorari therefrom was denied October, 1969 No. 596, reinstatement attempt was rejected in 1972. Ceriorari therefrom was denied in Cause 72-1241 on the docket hereof. In December, 1974, he drafted a survivorship deed and a pair of wills for former clients, husband and wife. The deed was in the name of a practicing attorney who testified, as did Petitioner, of authority to do so. The documents were never executed. Before any action was taken, Petitioner wrote to the Secretary of The Ohio Board of Commissioners requesting advice of returning the fee on the abortive transaction but was advised not to contact the parties.

Thereafter, the Respondent filed a complaint in contempt under Governing Rule V rather than seek a contempt citation for violation of the Court order in suspension. Rule V became effective February 28, 1972 (see Appendix C, pp. 16).

Respondent filed his defenses and made a timely request in writing for appointment of counsel to represent him at the scheduled hearing. He did not receive notice of rejection or overruling of such request until the day of hearing. These facts are corroborated in the dissenting opinion of the Court below (App. A, pp. 12, 13 and R.I.).

The record indicates five (5) attorneys entered appearances before the Panel of the Court. Petitioner appeared alone. Before any evidence was taken, Petitioner stated in the record that he wanted counsel, that being forced to proceed without counsel was a denial of due process. This was a raising of the Constitutional question at the earliest available opportunity. The dissent corroborates such declaration in the opinion below. (App. A), (R.I.) incorporated herein by reference.

Thereafter Petitioner proceeded to attempt to defend himself as his own counsel. A finding was made by the Panel that a violation had occurred and recommended that the Ohio Supreme Court disbar Petitioner permanently. On hearing before such Court, Petitioner engaged counsel from the Ohio Legal Services but the Ohio Supreme Court affirmed the findings and ordered Petitioner permanently disbarred on February 25, 1976. A motion for reconsideration was timely filed, then overruled, (App. B). By reason of inability to hire counsel, Petitioner has filed this appeal pro se.

ARGUMENT AND LAW

I. Statistics have proven in adversary proceedings presence of counsel is distinctly advantageous. Misdemeanants with counsel fare 5 to 1 better than those without. *Argersinger v. Hamlin*, 407 U.S. 25, 36.

"In civil cases, plaintiffs representing themselves were nine times less likely to obtain a settlement and the odds are as great in trial.

A study of mental commitments conducted by a student publication of the University of Toledo College of Law of mental hospital commitments found the percentage of unsuccessful commitments rose from 26.7% to 91.1% when the patient was represented by counsel." Brickman: "Of Arterial Passageways through the Legal Process: The Right of Universal Access to Courts and Lawyering Services", 48 N.Y.U.L. R. 595, 618. *Gideon v. Warmsright*, 372-U.S. 335, provided counsel for indigents in felony cases; *Arsinger*, supra, to misdemeanors. This Court has extended the assistance of counsel doctrine to "jail house" legal services and also provided in event of appeals "where an indigent was not represented by counsel in an appeal below, this Court may waive the requirement that the questions be preserved below." *Pollard v. U.S.* 352, U.S. 354, 359. The percentage of acquittals in felonies has been so minimal and of such rarity that courts refuse to allow a defendant to represent himself.

Indigency of an accused was the criteria in determining right to assistance or appointment of counsel in Gideon and Argersinger. The same test could apply here. Yet the record below is devoid of any evidence taken by the Panel or court of Petitioner's claim of inability to employ counsel as corroborated in the dissenting opinion.

The facts of his impecunious disposition would have, if adduced, shown the act charged was at a moment of fortune's low tide and also would have been in mitigation of penalty, if any. The Court knows that to decree disbarment is to decree poverty.

The economic factors or financial condition in mitigation could be adduced for Petitioner was too proud to admit same. *Benson v. State Bar*, 5 Cal. 3d 382, 388; *Brodpiece v. State*

Bar, 10 Cal. 3d 747, 518 p. 2d 337. During his long suspension, Petitioner's standard of living in his former position was reduced to one of almost abject poverty. He was without funds for counsel when these charges were filed. He had to sell his office building at great loss. He lost heavily in the market. He sold his office fixtures and supplies at great loss. His late model car was replaced by a 1966 vehicle. He was forced to sell his furniture and art to meet current living expenses. He paid for but lost in his try for reinstatement. His age and health were not favorable for private employment, although on the Civil Service list for years. His costly writings were making the rounds in literary circles, praised often, but never sold.

While there are no compilation of statistics on cases as that at Bar, it is equally persuasive that one should be saved from consequences of his own folly if a timely request is made therefor.

Because the Bar is the only profession that polices itself, fair disciplinary trials have always been persistently difficult. The Bar abhors adverse publicity to any lawyer. Such reflects on all in the public mind. This image arises out of the adversary system. An opprobrious accused may be disdained by most colleagues particularly when a prior infraction may have occurred. Any hearing is marked with hostitility, inimical in nature as the accused is a veritable anathema. The record below indicates such hostility by the resolute positions in actions taken. First, was in the conversion of an alleged contempt into a disbarment proceeding when Governing Rule V was not in existance at the time of his indefinite suspension, the refusal to allow the Petitioner to make restitution to the former clients, before any proceedings were filed; by rejection and overruling of motions for continuance until able to afford counsel or to appoint one for him or certify a federal question.

The final order could be construed or considered not as a judicial finding but an emotionally motivated one because the order itself is so harsh for one who allegedly violated the Court's order – that Petitioner could not be considered as a true adversary therein.

In cases of this nature, the accused himself is rarely heard in argument or if granted a right to argue, perfunctory attention is

given. In his experience, Petitioner has been told by counsel "The Court or Panel doesn't care to hear from you" and this Court can from its own knowledge and experience, take judicial notice of the same. So, if the accused is not to be heard and has no counsel, who would be a barrier or bulwork of safety between him and the Bar to cool their heat or champion or espouse his cause? In such instance isn't the denial of counsel a denial of due process? Yet the Panel and Court below by their decision held the proceedings were proper, although the issue was duly raised and argued.

"What constitutes due process under any set of circumstances must depend upon the nature of the proceedings involved and later rights that may possibly be affected by that proceeding." *Cafeteria & Restaurant Workers Union v. McElroy* 367 U.S. 886, 895.

Due process is not fixed in any form but tolerates variances in the form of a hearing "appropriate to the nature of the case", *Fuentes v. Shevin* 407 U.S. 82.

In re *Ruffalo*, 390 U.S. 544, described these proceedings as of an adversary nature, quasi criminal. Yet the Ohio court characterizes them as "neither civil nor criminal in nature, but investigatory." The fallacy of such usage lies in the fact that the argument fails when carried to a logical end. If the term "investigatory" is acceptable, why is punishment inflicted at the conclusion of such "investigation"? Surely one would have a right to defend against any punishment being imposed after the investigation. Regardless of the type of characterization or label placed on such proceedings, the question is: "do such proceedings come within the ambit of protection of "due process"? The ultimate test is fundamental fairness. It is obvious such fundamental fairness was not present below!

Assistance of counsel is a prerequisite to the very existence of a fair trial. *Powell v. Alabama* 287 U.S. 45, *Powell v. Texas* 382 U.S. 514. "The guiding hand" advocated in *Argersinger*, supra was conspicuously absent!

Petitioner was entitled to a fair hearing. In re *Ruffalo* 390 U.S. 544; *Spevak v. Klein*, 385 U.S. 511; in re Oiver, 333 U.S. 257. Justices Black and Douglas in *Isserman v. Ethics Committee*, 345 U.S. 927 stated:

> "A lawyer is denied due process when he is expelled from his profession without having an opportunity to confront his accusers and present evidence to deny, explain or extenuate the charges against him." See *Ex parte Robinson*, 19 Wall. 505, 512-513.

II. The conduct here was not malum se or insufficient for disbarment. Re *Ruffalo* 390 U.S. 555; nor would disbarment be ordered where reasonable minds differ (dissent) Re *Ruffalo*, supra.

The Court must be satisfied in its duty "not to disbar except upon conviciton that under the principles of right and justice it is constrained so to do". *Selling v. Radford* 243 U.S. 46, 51.

The New York Court of Cardozo, Pound and Crane felt a single occurrence was not the evil sought to be prohibited so an isolated incident was insufficient to sustain a conviction of unlawfully practicing law in violation of a statute. *People v. Goldsmith*, 249 N.Y. 536; *People v. Wiel*, 266 NYS 653. Here Petitioner did what any number of para legal aids would and could do in aid of an attorney. There was no evidence that the deeds or wills were drawn improperly or unusable.

In *Isserman*, 345 U.S. 292, Four (4) U. S. Supreme Court judges stated: "we do not recall any previous instance . . . where a lawyer has been disbarred by any Court of the United States or of a state merely because he had been convicted of a contempt."

Further, Petitioner submits he was niether disbarred nor reinstated under the Governing Rule V which was enacted after his infractions. There were no allegations or proof below that Petitioner's conduct was within purview of the rule. Hence a more cogent reason to refuse disbarment as there was no jurisdiction!

Lastly, the penalty for violation of a Court Order where an alternative remedy is available is "unnecessarily severe". In re *Sachar* 347 U.S. 388.

WHY THE WRIT SHOULD BE GRANTED

For the Petitioner this armageddon, the final battle in prolonged litigation over issues of due process. What acts were

complained of were not criminial nor did they involve moral turpitude yet in the case of an attorney the public thinks there was some crime or criminial conduct. For the disbarred, doors are closed, jobs are not available and as Lincoln wrote: "The tarnished lawyer becomes a homeless man." With suspension the door is left open to return to a chosen profession, the action here, if sustained, would bar the doors forever. A criminial can go to prison and find employment on release. A lawyer loses the right to use his skills or intelligence under this order forever. The harshness is readily seen. The Bar should be advised of this loss of rights. Aside from the personal elements the issue in this case presents the right of an indigent in adversary proceedings to counsel. The ruling here on a Constitutional issue will involve millions. All persons licensed in any area, real estate, vending, insurance and business will have transcendental Constitutional rights defined. The issue of due process in any type of hearing involving loss of license, business, reputation and property are affected. It is a matter of great general and public interest and one of novel interest that requires adjudication by this Court.

APPENDIX A

OHIO STATE BAR ASSOCIATION v. ILLMAN.

[Cite as Ohio State Bar Assn. v. Illman (1976), 45 Ohio St. 2d 159.]

(No. 75-4—Decided February 25, 1976.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Respondent, Harry R. Illman, was admitted to the Ohio Bar in 1943. He began his legal career in Toledo.

In October 1952, the Court of Common Pleas of Lucas County suspended him from the practice of law for a period of five years. Upon termination of the suspension respondent resumed his practice in Toledo. On May 21, 1969, this court entered an indefinite suspension order against respondent. (18 Ohio St. 2d 122.) Following respondent's application for reinstatement, on January 18, 1973, this court confirmed the recommendation of the board of commissioners and denied respondent's petition for reinstatement.

This court's suspension order, *supra*, mandated "that * * * [respondent] be forbidden to counsel or advise or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law." In instituting this proceeding, the Ohio Bar Association, relator, elected to proceed under the disciplinary procedures of Gov. R. V., rather than to seek a contempt citation for violation of this court's order.

Respondent's former clients, Mr. and Mrs. George Yaney testified that Illman contacted them by telephone in December 1973, and that the call was to discuss with them the advisability of revising their respective wills. Respondent discussed the wills at Yaney's home. The Yaneys followed Illman's recommendation that the wills be revised, and designated respondent as attorney for the executor in both wills. Respondent allegedly informed the Yaneys that his fee for preparing the will was

$160. A check for that amount was paid to Illman by George Yaney.

Respondent also advised the Yaneys that it would be to their best interest to execute new deeds to change their real estate holding to an estate by the entireties with survivorship. Respondent was authorized to prepare the new deeds. His fee for preparation of the deeds was allegedly $150. A check for that amount was paid to him by George Yaney.

Neither the wills nor the deeds were executed by the Yaneys.

Respondent admitted that he prepared the wills and the deeds. He claimed, however, that the $160 payment to him was for past legal services, a claim which was denied by the Yaneys.

Respondent, claiming indigency, requested that counsel be appointed to represent him. The record reveals that the complaint to instigate this proceeding was filed on April 3, 1974. The notice of filing complaint stated that respondent was required to file a written answer within 20 days after April 12, 1974. On May 1, 1974, respondent filed his answer. On August 12, 1974, the chairman of the board's hearing panel set the hearing for November 4, 1974. The board of commissioners received a motion from respondent on October 17, 1974, for appointment of counsel. This motion was overruled on October 28, 1974. Notice of such action was sent to respondent at his last known address, and returned by the postal authorities as undeliverable because respondent "moved." Upon a telephone call to the secretary of the board, respondent was notified of the board's decision and that the hearing would proceed on November 4, 1974, as originally scheduled.

The board recommended that respondent be disbarred from the practice of law in accordance with Gov. R. V. 5 (a).

Mr. John R. Welch, Mr. Albert L. Bell, Mr. Jack C. Harris and Mr. Harlan S. Hertz, for relator.

Messrs. Schwartz, Fisher, Spater, McNamara & Marshall, Mr. Theodore G. Fisher and Mr. Leonard J. Schwartz, for respondent.

Per Curiam. From a review of the record there is very little dispute as to evidence adduced before the board. Whether one of the two checks was paid by the Yaneys to respondent for present or past legal services is of no great significance. Respondent admitted preparing the deeds and the wills, and admitted receiving at least one check for such services. By no stretch of the imagination can the activity of the respondent be considered as paralegal or legal-intern services, as there was no semblance of compliance with the Ohio rules as to supervised limited practice of law by legal interns. See Gov. R. II, Section 2.

Respondent's admission that he prepared the instruments for the Yaneys is an admission that he violated this court's order of May 21, 1969.

Respondent's principle contention before the board was that during much of his life he was a "compulsive gambler," but now has disciplined himself through professional counselling and is no longer engaged in such activity. However that may be, "compulsive gambling" is no defense to an actual violation of an order issued by this court to a suspended attorney not to engage in the practice of law.

In his brief and oral argument to this court, respondent claims that the board's hearing panel denied him due process by failing to continue the hearing and appoint counsel to represent him at the hearing.

In *Ohio State Bar Assn.* v. *Weaver* (1975), 41 Ohio St. 2d 97, 100, this court held that "[t]he court's purpose in a proceeding [disciplinary] of this type is not to enforce the criminal code, but rather to investigate the conduct and fitness of one of its officers. These proceedings are neither civil nor criminal; they are instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed to practic law."

The primary function of disciplinary proceedings is investigatory, not accusarory or prosecutorial, and those proceedings

are neither civil nor criminal in nature. The standards of due process in such proceedings are not those in a criminal proceeding, nor does it seem to us a necessity of due process that a respondent, who has practiced as an attorney, be entitled as a matter of right to have counsel appointed for him. Furthermore, the record shows that respondent conducted his defense with adroit cross-examination and argued before the panel with logic and self-control.

Upon a review of the entire record, we find that the board's hearing panel did not abuse its authority in refusing to appoint counsel to represent respondent.

A summary of respondent's conduct since admission to the Bar of Ohio reveals two court-ordered suspensions from the practice of law, coupled with a violation of this court's order prohibiting respondent from practicing law.

We conclude, therefore, that respondent's misconduct requires his disbarment, and it is so ordered.

Judgment accordingly.

O'Neill, C. J., Herbert, Corrigan, Stern, Celebrezze and W. Brown, JJ., concur.

Paul W. Brown, J., dissenting. Because the board of commissioners denied a timely request by respondent for the assistance of legal counsel, I cannot join the majority opinion which disbars the respondent from the practice of law. The board's assertion, in its report to this court, that "[r]espondent *elected* to serve as his own attorney," is not supported by the record. (Emphasis added.)

Relator's complaint was filed with the board of commissioners on April 3, 1974. Notice of the filing was sent to respondent on April 10. On May 1, respondent filed an answer to the complaint, and a "motion to stay or consolidate." In that motion, respondent stated that he was undergoing "prolonged, extensive, and expensive psychoanalysis," and that he would be without sufficient funds to engage counsel until after January 1, 1975. Respondent stated further that he would be eligible to petition for reinstatement to the bar in January 1975,

and suggested consolidating the disciplinary and reinstatement proceedings.

On May 22, the motion to stay or consolidate was denied. Counsel for relator was instructed to make inquiry concerning respondent's mental condition. On August 5, in response to such inquiry, respondent by letter advised relator and the board, "* * * I am still unemployed and without funds for employment of counsel," and made inquiry as to the possibility of appointed counsel.

An August 12, without any action on respondent's request for counsel, the formal hearing on relator's complaint was scheduled for November 4, 1974.

On October 17, respondent filed a motion to set aside and vacate the hearing date, stating that he was in a state of severe depression, under the care of an analyst in the psychiatric department of the Ohio Medical College, and without funds to retain counsel. Respondent stated further that he had written to former counsel, had received no response, and "has waited until the present time in hopes of such response and that respondent is unwilling to force or impose himself on such counsel in this matter under such circumstances." On October 28, respondent's motion was overruled. Respondent did not receive written notice of that action until the morning of November 4.

On November 4, prior to the introduction of evidence before representatives of the board of commissioners, respondent renewed his request for appointed counsel. Respondent stated, in part:

"I would like to have the panel appoint counsel for me because I do not feel adequately mentally prepared to undertake my defense on this or any other matter and I will accept any counsel that you deem appropriate for the purpose of this hearing. This is a very important hearing and I think I should be represented by counsel and I don't feel that I could do so myself. This same matter would have a counsel appointed in a criminal case and this involves a professional life, loss of reputa-

tion, loss of income and so forth as well as humiliation and especially my mental condition it would be a horrendous burden to proceed without counsel in a case of this nature and so I would like counsel to represent me and I would like the record to show that I strenuously object to proceeding without adequate representation and I want the benefit of counsel at any hearing of this nature."

Respondent's request was again overruled, forcing him to conduct his own defense.

A proceeding to suspend a professional license must comport with the requirements of due process of law. *In re Ruffalo* (1968), 390 U. S. 544; *Spevack* v. *Klein* (1967), 385 U. S. 511. This court has never held that such a proceeding entitles a responding party to the assistance of counsel. In my judgment, however, "disbarment and the loss of professional standing, professional reputation, and of livelihood" *(Spevack, supra,* at page 516) are penalties at least as severe as those imposed in many criminal cases, where the assistance of appointed counsel is made available as a matter of course.

Where the need for the assistance of counsel is manifest, fundamental fairness dictates that one charged as was the respondent be assisted upon timely request. The entitlement should depend, not upon whether the respondent ought to be able to employ counsel, but whether he is in fact unable to employ counsel, by reason of indigency or otherwise. See *State* v. *Tymcio* (1975), 42 Ohio St. 2d 39. I would remand this cause to the board of commissioners, for a determination of respondent's entitlement to appointed counsel, and a rehearing on the merits of relator's complaint.

SC-18

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 76 TERM

To wit: March 19, 1976

Ohio State Bar Association,
Relator,

vs.

Harry R. Ilman,
Respondent.

No. DD 75-4

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 19th day of March, 19 76

THOMAS L. STARTZMAN *Clerk.*

By Joann L. Gilbreath *Deputy.*

APPENDIX C

Governing Rule V, Subsection 7, effective February 28, 1972

(7) Effect of Discipline. A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

APPENDIX D

THE FEDERAL QUESTION

Petitioner, after overruling of his Motion for Reconsideration by the Ohio Supreme Court, filed a request in writing with the cover sheet therof entitled "Request For a Certificate To Show Federal Question". The first two paragraphs of such request provided as follows:

> "Respondent respectfully moves the Court for an Order to direct the Clerk of this Court to prepare and mail to Respondent a certificate for use on appeal from the order hereof that a federal question, that is denial of due process, among others, was an issue raised, argued and presented in trial hereof.
>
> Respondent respectfully represents that prior to the taking of any evidence hereof, he complained that being "forced" to proceed without counsel was a denial of due process under the Constitution. The dissenting opinion corroborates such argument made in the record. Since the federal question should be clearly shown on appeal to the U. S. Supreme Court, this request is made for such purpose."

It was this request that was denied in the Order following herewith.

SC-8 (BLANK ENTRY)

THE STATE OF OHIO,
City of Columbus.

19 76 TERM

Ohio State Bar Association,
Relator,

To wit: April 28, 1976

No. DD 75-4

vs.

Harry R. Illman,
Respondent.

E N T R Y

Upon consideration of the motion, filed by respondent, for a certificate to show federal question, it is ordered by the court that this motion be, and the same hereby is, denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th *day of* April *19*76

THOMAS L. STARTZMAN
.....*Clerk.*

By Rose A. Jeckins .....*Deputy.*

CERTIFICATE OF SERVICE

STATE OF OHIO)
) SS: AFFIDAVIT
COUNTY OF LUCAS)

Harry R. Illman, being first duly sworn upon oath deposes and says that he is the Petitioner and Affiant herein; that Affiant has prepared the brief in this writ himself and is appearing in his own behalf, pro se, that he is not a member of the Bar of this Court; that pursuant to Part VIII Rule 33 of the Rules of the Supreme Court of the United States Affiant made service of a copy of the brief hereof by mailing by certified mail true copies of the same to the Ohio State Bar Association Attorneys at the address listed on the cover page herein, by accordance with Rule 33 (1) thereof. Affiant states that such mailing was made on the 11th day of May, 1976; that on the same date 40 copies of the brief herein was mailed to the Clerk of this Court.

Affiant further sayeth not.

Harry R. Illman
HARRY R. ILLMAN

Sowrn to before me and subscribed in my presence this 11th day of May, 1976.

KATHLEEN R. HORRIGAN
Notary Public, Lucas County, Ohio
My Commission Expires Oct 10, 1976

Kathleen R. Horrigan
Notary Public, State of Ohio

Supreme Court, U. S.
FILED
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IN THE

Supreme Court Of The United States

October Term 1975

No. 75-1669

HARRY R. ILLMAN,

Petitioner,

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OHIO STATE BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Pages

Statement 1

Questions Presented 4

Argument 4

Conclusion 8

Certificate of Service 9

APPENDIX A

Rule V Disciplinary Procedure —

29 Ohio St. 2d XXIX 10

Paragraph (5) (a) Misconduct—Definition 15

Paragraph 6—Manner of Discipline 16

Cases

Cleveland Bar Assn. v. Pleasant, 167 Ohio St. 325-335, 148 NE 2d 493, cert. den. 385 U.S. 842, 3 L. Ed. 2d 76 7

Selling v. Radford, 243 U.S. 47-48; 61 L. Ed. 586-587 8

Herb v. Pitcairn, 324 U.S. 117-125-6 8

IN THE

Supreme Court Of The United States

October Term 1975

No. 75-1669

HARRY R. ILLMAN,

Petitioner,

vs.

OHIO STATE BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This case concerns an order of the Court below disbarring Petitioner from the practice of law in Ohio.

Petitioner concedes that "The salient facts are apparent from the opinion of the lower court and can be readily stipulated." (Petitioner's Brief p. 2). We agree. However, Petitioner's statement that "Respondent filed a complaint in *contempt* under Governing Rule V rather than seek a contempt citation for violation of the Court order", (Petitioner's Brief p. 3), is not correct and not in accord with the facts found by the Court below. The proceedings in the Court below were disciplinary proceedings, not proceedings in contempt. Furthermore, these proceedings were filed under Governing Rule V, paragraph (5) (a) and not

paragraph 7. Governing Rule V (5) (a) defines misconduct in pertinent part as,

> "Misconduct shall mean * * * disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, * * *."

It is also incorrect to state (Petitioner's Brief p. 7) that Governing Rule V was enacted after his infractions. Insofar as we are concerned here, Governing Rule V is precisely the same as former Rule XVIII of the Court below which became effective March 11, 1964. (See 20 Ohio St. 2d p. XXXVII and XXXIX — Rules of Practice.)

There is also a misstatement of fact in the second Question Presented. (Petitioner's Brief p. 2) There was no finding of fact in the Court below that Petitioner was "acting under the direction of another lawyer" when he prepared wills and deeds for his former clients.

The Court below found the facts to be as follows:

> "Respondent, Harry R. Illman, was admitted to the Ohio Bar in 1943. He began his legal career in Toledo.
>
> "In October 1952, the Court of Common Pleas of Lucas County suspended him from the practice of law for a period of five years. Upon termination of the suspension respondent resumed his practice in Toledo. On May 21, 1969, this court entered an indefinite suspension order against respondent. (18 Ohio St. 2d 122.) Following respondent's application for reinstatement, on January 18, 1973, this court confirmed the recommendation of the board of commissioners and denied respondent's petition for reinstatement.

> "This court's suspension order, *supra*, mandated 'that * * * (respondent) be forbidden to counsel or advise or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law.' In instituting this proceeding, the Ohio Bar Association, relator, elected to proceed under the disciplinary procedures of Gov. R. V., rather than to seek a contempt citation for violation of this court's order.
>
> "Respondent's former clients, Mr. & Mrs. George Yaney testified that Illman contacted them by telephone in December 1973, and that the call was to discuss with them the advisability of revising their respective wills. Respondent discussed the wills at Yaney's home. The Yaneys followed Illman's recommendation that the wills be revised, and designated respondent as attorney for the executor in both wills. Respondent allegedly informed the Yaneys that his fee for preparing the will was $160. A check for that amount was paid to Illman by George Yaney.
>
> "Respondent also advised the Yaneys that it would be to their best interest to execute new deeds to change their real estate holding to an estate by the entireties with survivorship. Respondent was authorized to prepare the new deeds. His fee for preparation of the deeds was allegedly $150. A check for that amount was paid to him by George Yaney.
>
> "Neither the wills nor the deeds were executed by the Yaneys.
>
> "Respondent admitted that he prepared the wills and the deeds. He claimed, however, that the $160 payment to him was for past legal services, a claim which was denied by the Yaneys.
>
> "Respondent, claiming indigency, requested that counsel be appointed to represent him. The

record reveals that the complaint to instigate this proceeding was filed on April 3, 1974. The notice of filing complaint stated that respondent was required to file a written answer within 20 days after April 12, 1974. On May 1, 1974, respondent filed his answer. On August 12, 1974, the chairman of the board's hearing panel set the hearing for November 4, 1974. The board of commissioners received a motion from respondent on October 17, 1974, for appointment of counsel. This motion was overruled on October 28, 1974. Notice of such action was sent to respondent at his last known address, and returned by the postal authorities as undeliverable because respondent "moved." Upon a telephone call to the secretary of the board, respondent was notified of the board's decision and that the hearing would proceed on November 4, 1974, as he originally scheduled.

"The board recommended that respondent be disbarred from the practice of law in accordance with Gov. R. V. 5 (a)."

QUESTIONS PRESENTED

1. Does the denial of a timely request for counsel by an indigent in a disciplinary or contempt proceeding constitute denial of "due process of law" within the purview of the Fourteenth Amendment?

2. Is the mere preparation of an unexecuted will and a deed by a suspended attorney, acting under direction of a lawyer, conduct malum in se to warrant an order of disbarment therefor; or does such order violate "due process of law" provisions of the United States Constitution?

ARGUMENT

This case presents the issue whether the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, is required under the due

process clause of the Fourteenth Amendment of the United States Constitution to furnish counsel to an alleged indigent lawyer under investigation for alleged misconduct in proceedings before the Board.

The Court below holds that it is not so required because,

> "The primary function of disciplinary proceedings is investigatory, not accusatory or prosecutorial and those proceedings are neither civil nor criminal in nature. The standards of due process in such proceedings are not those in a criminal proceeding, nor does it seem to us a necessity of due process that a respondent, who has practiced as an attorney at law, be entitled as a matter of right to have counsel appointed for him. Furthermore, the record shows that respondent conducted his defense with adroit cross-examination and argued before the panel with logic and self-control." (Decision of the Court below, Petitioner's Brief p. 11-12.)

I. THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

For an understanding of disciplinary proceedings in the Court below, we briefly summarize that procedure. (The full text of Ohio Disciplinary Procedure may be found in Appendix A)

Since January 1, 1957, lawyer disciplinary proceedings in Ohio have been under the exclusive jurisdiction of the Supreme Court.

Pursuant to its Rule V (formerly numbered Rule XVIII and Rule XXVII) the Court below put investigation of charges of misconduct against lawyers in the hands of a Board of Commissioners on Grievances and Discipline (hereinafter called the Board) consisting of 17 lawyers appointed by the court.

Under Rule V, charges of misconduct against a

lawyer are filed by a bar association with the Board. The Board notifies the lawyer of the charges and requests his answer. Upon the filing of the lawyer's answer, a panel of three members of the Board is appointed by the Chairman of the Board to hear evidence on the charges and the lawyer's defenses. The panel sets a date for the hearing and notifies the parties. In this case, the parties were notified August 12, 1974, that the hearing was set for November 4, 1974.

It was at this stage in the proceedings, on October 17, 1974, that Petitioner requested the hearing panel to furnish him counsel and was denied.

At the conclusion of the evidentiary hearing, the panel makes findings of fact and recommendations on discipline to the Board. The Board reviews the entire proceedings, and makes its findings of fact and recommendation to the Supreme Court, and files the complete record of the proceedings in the Supreme Court. The Board notifies the parties of its findings of fact and recommendation.

The Court below then issues an Order to the lawyer to Show Cause why the findings and recommendation of the Board shall not be confirmed.

That is the exact procedure followed in this case.

It was at this stage in the proceedings, that is, in response to the Order to Show Cause, that Petitioner employed counsel of his own choosing who presented written and oral argument to the Court below in behalf of Petitioner. (Petitioner's Brief p. 3)

It will be observed from the above summary of the proceedings before the Board, that neither the Board nor its hearing panels have adjudicatory powers; neither the Board nor its panels issue orders or make

any determination which will affect the legal rights of the lawyer. Their function is to hear the evidence and to make findings of fact and recommendations to the Court below, and that is all they do.

It is the Court below that has sole responsibility for determining what the facts are and what action should be taken on those facts. *Cleveland Bar Assn. v. Pleasant* (1958) 167 Ohio St. 325-335, 148 NE 2d 493, cert. den. 385 U. S. 842, 3 L. Ed 2d 76, wherein the court said:

> "There can be no question now of the inherent power of this court as to the disciplining of attorneys, and, therefore, of its power to provide by rule the procedure in reference to hearings upon such questions. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline. Such Board or its panels have no power to discipline an attorney except with reference to a private reprimand, and surely that can not constitute a judgment, for the power to give such a reprimand would be inherent without any authorization by this court. *As to any other disciplinary action, all that the board can do is to investigate and make findings of fact and recommendations, and the only order or decision is made solely by this court.*" (Emphasis supplied.)

With respect to the issue sought to be raised here, that the Court below was required to furnish Petitioner counsel at government expense, it will be observed that Petitioner had the assistance of counsel of his own choosing in the hearing before the Court below which has exclusive power to determine what the facts are and the action to be taken on those facts. Surely, in a case such as this one, where all relevant facts are admitted, due process does not require more.

II. THE JUDGMENT OF THE COURT BELOW RESTS ON ADEQUATE AND INDEPENDENT NON-FEDERAL GROUNDS.

All of the facts relevant to a determination on the merits by the Court below are admitted by the Petitioner. (Petitioner's Brief p. 2; Decision of Court Below, Petitioner's Brief p. 10-11.)

Therefore, without regard for the issue sought to be raised by Petitioner, the facts in this case will not change, nor will the decision of the Court below on those facts.

Disbarment being a matter within the sound judicial discretion of the Court below, it is not reviewable here. *Selling v. Radford*, 243 U. S. 47-48; 61 L. Ed 586-587.

In *Herb v. Picairn*, 324 U. S. 117-125-6, this court said in regards to review of state court judgments:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief has been mailed by first class mail with postage prepaid to Harry R. Illman, Pro Se, 2210 Stirrup Lane Apt. K-7, Toledo, Ohio 43613.

JOHN R. WELCH
Attorney for Respondent

APPENDIX A

RULE V.
DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) **Creation of Board of Commissioners on Grievances and Discipline.** There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: District 1, comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. District 2, comprising Darke, Miami, Montgomery, Preble and Shelby Counties. District 3, comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. District 4, comprising Lucas County. District 5, comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. District 6, comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. District 7, comprising Franklin County. District 8, comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. District 9, comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. District 10, comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. District 11, comprising Portage and Summit Counties. District 12, comprising Cuyahoga County, District 13, comprising Ashtabula, Columbia, Geauga, Lake, Mahoning and Trumbull Counties. District 14, comprising Carroll, Stark and Tuscarawas Counties. District 15, comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. District 16, comprising Allen, Auglaize, Hardin and Mercer Counties. District 17, comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1, of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners and designate a Secretary, each of

whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

(2) **Jurisdiction of Board.** The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court as hereinafter provided:

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court or a breach of these rules but did not take place in the presence of the court or a member thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of this

Court to impose punishment with reference either to contempts or breaches of of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(3) **Referral for Investigation.** The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

(4) **Application of Rule; Authority and Duty of Local Committees.** From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where misconduct, contempt, or mental illness is found; provided,

however, that nothing herein shall effect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

In the event that a Grievance Committee of a local bar association or the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association shall in the case of a disciplinary investigation as provided for in this rule seek determination of a procedural question, the principal officer of a local bar association or the Chairman of its Grievance Committee or the Chairman of the appropriate state bar association committee shall direct a written inquiry to the Chairman of the Board of Commissioners by filing it with the secretary

of the Board. Upon receipt of such written request, the Chairman of the Board of Commissioners may refer the inquiry to a panel of three members of the Board. The written request shall be documented with such facts, citations, statutory references and other written data that may be of assistance to make a determination of the matter presented. After the panel has completed its study of the problem presented, the panel shall make a written recommendation as to solution of the question. Upon receipt of such report and recommendation, the Chairman of the Board of Commissioners shall promptly convene the members of the Board who shall approve, reject, modify or otherwise dispose of the panel's recommendation. In the event that the question presented requires immediate attention for decision, the Chairman of the Board has the discretionary power to waive reference of the question to a panel, but shall submit the question or questions presented to the entire Board for its decision.

(5) **Definitions.**

(a) **Misconduct.** Misconduct shall mean any violation of any provision of the oath of office taken upon admission to the practice of law in this State, or any violation of the Code of Professional Responsibility or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of these rules or of the terms of an order imposing a suspension for an indefinite

period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) **Mental Illness.** Mental illness shall mean the condition defined in R. C. 5122.01(A).

(6) **Manner of Discipline.** Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or,

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or,

(c) a public reprimand, or

(d) a private reprimand.

(7) **Effect of Discipline.** A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) **The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary, or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

(9) **Duty of the Board Upon Filing of the Complaint.**

(a) **Notice to Respondent.** The Secretary of the Board of Commissioners shall send a

copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

(b) **Suspension of Right to Practice Pending Disposition of Misconduct Complaint.** After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by the certified copy of the judgment entry of the Court convicting the Respondent.

(c) **Mental Illness Suspension.** After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (d) hereof, The Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

(d) **Examination.** If the complaint or answer alleges existing mental illness unsupported

by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(e) **Termination.** Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(10) **Hearing by Panel of Three Commissioners.** After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constiute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall

be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(11) **Authority of Panel; Dismissal or Private Reprimand.** If the panel finds that the complaint or evidence is insufficient to base a charge of misconduct or that the complaint or evidence supports a charge of misconduct for which a private reprimand should be administered, the panel may order that the complaint be dismissed or administer such private reprimand at the time of the hearing. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.
If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(12) **Referral by Panel.** In the alternative, if the panel determines that findings of fact and recommendations for dismissal or private reprimand should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal or private reprimand in

the same manner as provided in the following sections of this Rule V with respect to public reprimand, suspension or disbarment.

(13) **Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) **Review by Entire Board of Commissioners; Board to Administer Private Reprimand.** Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Sec-

retary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) **Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review.** If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) **Show Cause Order Issued by the Court to Respondent.** On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) **Response to Order to Show Cause and Objections.** The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(18) **Answer Briefs.** Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) **Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order.** After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or as-

sociations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

(20) **Proceedings Private; Exceptions.** All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except:

(a) Where the Respondent shall request in writing that they be public or

(b) Where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(21) **Petition for Reinstatement.** No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) **Contents of Petition for Reinstatement.** Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of

Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the Petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possesses all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, nothwithstanding the previous disciplinary action taken against him.

(23) **Costs to be Deposited with Petition for Reinstatement.** Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) **Requisites for Reinstatement.** No person shall be reinstated unless he has established by clear and convincing evidence that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio

at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule I of the Supreme Court Rules for the Government of the Bar of Ohio shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) **Petition for Reinstatement Referred to Board of Commissioners.** Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) **Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners.** The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom

shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropirate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition of readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof. If the final report should recommend granting

of the petition any person or organization referred to in Section (22) (c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(27) **Manner of Service of Notices, etc.** Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) **Quorum of Panel or Board.** A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) **Clerk is Agent for Service of Notices on Nonresident Attorney.** Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently be-

comes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

(30) **Manner of Service on Clerk; Record of Such Service Not a Public Record.** All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service, upon said Clerk of this Court, addressed to such Respondent at his last known address. The Postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) **Power to Issue Subpoenas.** In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee of Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any subcommittee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(32) **May Order Depositions.** The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) **Effect of Refusal to Testify.** The refusal or neglect of the person subpoenaed as a witness to

obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) **Rules of Evidence.** All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(35) **Docket of Complaints.** The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) **Board May Prescribe Rules.** The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(37) **Rule to be Liberally Construed.** The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for rein-

statement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule became effective shall continue to apply.

Supreme Court, U. S.
FILED
AUG 2 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1669

HARRY R. ILLMAN

Petitioner

vs.

OHIO STATE BAR ASSOCIATION

Respondent

PETITIONER'S REPLY BRIEF

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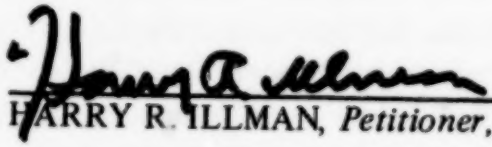
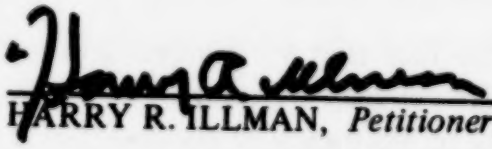
All the foregoing are reduced to sententious cliches if certiorari is denied. The scope of this case is the right to a lawyer where a re uest is timely made or the right to a continuance until a law er is secured. The problem affects and is common to all. Everybody should be entitled to a lawyer on request. Certiorari must issue. Please.



HARRY R. ILLMAN, *Petitioner, Pro Se*

CERTIFICATION

The undersigned hereby certifies that five copies of the foregoing brief has been mailed by first class mail with postage prepaid to John R. Welch, Albert L. Bell, Jack C. Harris, Harlan S. Hertz c/o Ohio State Bar Association, 33 West 11th Avenue, Columbus, Ohio 43201, this day of July 1976.



HARRY R. ILLMAN, *Petitioner, Pro Se*

Supreme Court, U. S.
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2,3
Questions Presented	2
Constitutional Provisions Involved	2
Statement of Case	2,3
Argument and Law	4-7
Reasons Why Writ Should Be Granted	7,8
Appendix A	
Judgment and Opinion of Supreme Court of Ohio	9-15
Appendix B	
Denial of Motion for Rehearing	15
Appendix C	
Governing Rule V	16
Appendix D	
Statement of Federal Question	17,18
Certificate of Service	19

CITATIONS

Cases

	Page
Argersinger v. Hamlin, 407 U.S. 25	4,6
Benson v. State Bar, 5 Cal. 3d 302	4
Brodpiece v. State Bar, 10 Cal. 3d 747, 518 p2d 337	4
Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886	6
Gideon v. Wainwright, 372 U.S. 335	4
Fuentes v. Shevin, 407 U.S. 82	6
In Re Isserman, 345 U.S. 297	7
Isserman v. Ethics Committee, 345 U.S. 927	6
In re Oliver, 333 U.S. 257	6
People v. Goldsmith, 249 N.Y. 586	7
People v. Wiel, 266 NYS 658	7
Pollard v. U.S., 352 U.S. 354	4
Powell v. Alabama, 287 U.S. 45	6
Powell v. Texas, 392 U.S. 514	6
Ex Parte Robinson, 19 Wall. 505	7
In re Ruffalo, 390 U.S. 544	6,7
In re Sachar, 347 U.S. 388	7
Selling v. Radford, 243 U.S. 46	7
Spevak v. Klein, 385 U.S. 511	6

Texts

Brickman "Of Arterial Passageways Through The Legal Process: The Right of Universal Access to Courts and Lawyering Services," 48 NYULR 595 4

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

HARRY R. ILLMAN
Respondent

vs.

OHIO STATE BAR ASSOCIATION
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Harry R. Illman, prays for a Writ of Certiorari to review an order of The Supreme Court of Ohio entered on February 25, 1976 which permanently disbarred him from the right to practice law.

OPINION BELOW

The Opinion of The Supreme Court of Ohio by a 6 to 1 decision approving the findings of a hearing panel is found in Appendix A, pp. 10-13. A motion for rehearing was overruled on March 19, 1976 see Appendix B, pp. 15.

JURISDICTION

(1) Jurisdiction of this court is invoked under and by virtue of 28 U.S.C. 1257 (3) wherein petitioner claims he has been deprived of rights and privileges set up or claimed under the Constitution of the United States wherein petitioner claims denial of a timely request for counsel in a disciplinary proceeding or contempt action was a denial of due process.

(2) Rule 19 of this court which provides for a writ of certiorari "where a state court has a federal question of substance

not theretofore determined by this court, or had decided it in a way probably not in accord with applicable decisions of this court."

(3) Cases in support of jurisdiction are: In re *Ruffalo, Jr.* 390 U.S. 544; *Spevak v. Klein* 385 U.S. 511; *Powell v. Texas* 392 U.S. 514; *Argersinger v. Hamlin* 407 U.S. 25, *Ex parte Robinson,* 19 Wall, 505, In re *Oliver* 333 U.S. 257.

QUESTIONS PRESENTED

1. Does the denial of a timely request for counsel by an indigent in a disciplinary or contempt proceeding constitute denial of "due process of law" within the purview of the Fourteenth Amendment?
2. Is the mere preparation of an unexecuted will and a deed by a suspended attorney, acting under direction of a lawyer, conduct malum in se to warrant an order of disbarment therefor; or does such order violate "due process of law" provisions of the U. S. Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's appeal can be decided without resort to a full transcript. The salient facts are apparent from the opinion of the lower court and can be readily stipulated. The simple facts are Petitioner was suspended for a period of five years

in 1952 then indefinitely suspended in December, 1969. Certiorari therefrom was denied October, 1969 No. 596, reinstatement attempt was rejected in 1972. Ceriorari therefrom was denied in Cause 72-1241 on the docket hereof. In December, 1974, he drafted a survivorship deed and a pair of wills for former clients, husband and wife. The deed was in the name of a practicing attorney who testified, as did Petitioner, of authority to do so. The documents were never executed. Before any action was taken, Petitioner wrote to the Secretary of The Ohio Board of Commissioners requesting advice of returning the fee on the abortive transaction but was advised not to contact the parties.

Thereafter, the Respondent filed a complaint in contempt under Governing Rule V rather than seek a contempt citation for violation of the Court order in suspension. Rule V became effective February 28, 1972 (see Appendix C, pp. 16).

Respondent filed his defenses and made a timely request in writing for appointment of counsel to represent him at the scheduled hearing. He did not receive notice of rejection or overruling of such request until the day of hearing. These facts are corroborated in the dissenting opinion of the Court below (App. A, pp. 12, 13 and R.I.).

The record indicates five (5) attorneys entered appearances before the Panel of the Court. Petitioner appeared alone. Before any evidence was taken, Petitioner stated in the record that he wanted counsel, that being forced to proceed without counsel was a denial of due process. This was a raising of the Constitutional question at the earliest available opportunity. The dissent corroborates such declaration in the opinion below. (App. A), (R.I.) incorporated herein by reference.

Thereafter Petitioner proceeded to attempt to defend himself as his own counsel. A finding was made by the Panel that a violation had occurred and recommended that the Ohio Supreme Court disbar Petitioner permanently. On hearing before such Court, Petitioner engaged counsel from the Ohio Legal Services but the Ohio Supreme Court affirmed the findings and ordered Petitioner permanently disbarred on February 25, 1976. A motion for reconsideration was timely filed, then overruled, (App. B). By reason of inability to hire counsel, Petitioner has filed this appeal pro se.

ARGUMENT AND LAW

I. Statistics have proven in adversary proceedings presence of counsel is distinctly advantageous. Misdemeanants with counsel fare 5 to 1 better than those without. *Argersinger v. Hamlin,* 407 U.S. 25, 36.

"In civil cases, plaintiffs representing themselves were nine times less likely to obtain a settlement and the odds are as great in trial.

A study of mental commitments conducted by a student publication of the University of Toledo College of Law of mental hospital commitments found the percentage of unsuccessful commitments rose from 26.7% to 91.1% when the patient was represented by counsel." Brickman: "Of Arterial Passageways through the Legal Process: The Right of Universal Access to Courts and Lawyering Services", 48 N.Y.U.L. R. 595, 618. *Gideon v. Warmsright,* 372-U.S. 335, provided counsel for indigents in felony cases; *Arsinger,* supra, to misdemeanors. This Court has extended the assistance of counsel doctrine to "jail house" legal services and also provided in event of appeals "where an indigent was not represented by counsel in an appeal below, this Court may waive the requirement that the questions be preserved below." *Pollard v. U.S.* 352, U.S. 354, 359. The percentage of acquittals in felonies has been so minimal and of such rarity that courts refuse to allow a defendant to represent himself.

Indigency of an accused was the criteria in determining right to assistance or appointment of counsel in Gideon and Argersinger. The same test could apply here. Yet the record below is devoid of any evidence taken by the Panel or court of Petitioner's claim of inability to employ counsel as corroborated in the dissenting opinion.

The facts of his impecunious disposition would have, if adduced, shown the act charged was at a moment of fortune's low tide and also would have been in mitigation of penalty, if any. The Court knows that to decree disbarment is to decree poverty.

The economic factors or financial condition in mitigation could be adduced for Petitioner was too proud to admit same. *Benson v. State Bar,* 5 Cal. 3d 382, 388; *Brodpiece v. State*

Bar, 10 Cal. 3d 747, 518 p. 2d 337. During his long suspension, Petitioner's standard of living in his former position was reduced to one of almost abject poverty. He was without funds for counsel when these charges were filed. He had to sell his office building at great loss. He lost heavily in the market. He sold his office fixtures and supplies at great loss. His late model car was replaced by a 1966 vehicle. He was forced to sell his furniture and art to meet current living expenses. He paid for but lost in his try for reinstatement. His age and health were not favorable for private employment, although on the Civil Service list for years. His costly writings were making the rounds in literary circles, praised often, but never sold.

While there are no compilation of statistics on cases as that at Bar, it is equally persuasive that one should be saved from consequences of his own folly if a timely request is made therefor.

Because the Bar is the only profession that polices itself, fair disciplinary trials have always been persistently difficult. The Bar abhors adverse publicity to any lawyer. Such reflects on all in the public mind. This image arises out of the adversary system. An opprobrious accused may be disdained by most colleagues particularly when a prior infraction may have occurred. Any hearing is marked with hostitility, inimical in nature as the accused is a veritable anathema. The record below indicates such hostility by the resolute positions in actions taken. First, was in the conversion of an alleged contempt into a disbarment proceeding when Governing Rule V was not in existance at the time of his indefinite suspension, the refusal to allow the Petitioner to make restitution to the former clients, before any proceedings were filed; by rejection and overruling of motions for continuance until able to afford counsel or to appoint one for him or certify a federal question.

The final order could be construed or considered not as a judicial finding but an emotionally motivated one because the order itself is so harsh for one who allegedly violated the Court's order – that Petitioner could not be considered as a true adversary therein.

In cases of this nature, the accused himself is rarely heard in argument or if granted a right to argue, perfunctory attention is

given. In his experience, Petitioner has been told by counsel "The Court or Panel doesn't care to hear from you" and this Court can from its own knowledge and experience, take judicial notice of the same. So, if the accused is not to be heard and has no counsel, who would be a barrier or bulwork of safety between him and the Bar to cool their heat or champion or espouse his cause? In such instance isn't the denial of counsel a denial of due process? Yet the Panel and Court below by their decision held the proceedings were proper, although the issue was duly raised and argued.

"What constitutes due process under any set of circumstances must depend upon the nature of the proceedings involved and later rights that may possibly be affected by that proceeding." *Cafeteria & Restaurant Workers Union v. McElroy* 367 U.S. 886, 895.

Due process is not fixed in any form but tolerates variances in the form of a hearing "appropriate to the nature of the case", *Fuentes v. Shevin* 407 U.S. 82.

In re *Ruffalo,* 390 U.S. 544, described these proceedings as of an adversary nature, quasi criminal. Yet the Ohio court characterizes them as "neither civil nor criminal in nature, but investigatory." The fallacy of such usage lies in the fact that the argument fails when carried to a logical end. If the term "investigatory" is acceptable, why is punishment inflicted at the conclusion of such "investigation"? Surely one would have a right to defend against any punishment being imposed after the investigation. Regardless of the type of characterization or label placed on such proceedings, the question is: "do such proceedings come within the ambit of protection of "due process"? The ultimate test is fundamental fairness. It is obvious such fundamental fairness was not present below!

Assistance of counsel is a prerequisite to the very existence of a fair trial. *Powell v. Alabama* 287 U.S. 45, *Powell v. Texas* 382 U.S. 514. "The guiding hand" advocated in *Argersinger,* supra was conspicuously absent!

Petitioner was entitled to a fair hearing. In re *Ruffalo* 390 U.S. 544; *Spevak v. Klein,* 385 U.S. 511; in re Oiver, 333 U.S. 257. Justices Black and Douglas in *Isserman v. Ethics Commit-*

tee, 345 U.S. 927 stated:

> "A lawyer is denied due process when he is expelled from his profession without having an opportunity to confront his accusers and present evidence to deny, explain or extenuate the charges against him." See *Ex parte Robinson,* 19 Wall. 505, 512-513.

II. The conduct here was not malum se or insufficient for disbarment. Re *Ruffalo* 390 U.S. 555; nor would disbarment be ordered where reasonable minds differ (dissent) Re *Ruffalo,* supra.

The Court must be satisfied in its duty "not to disbar except upon conviciton that under the principles of right and justice it is constrained so to do". *Selling v. Radford* 243 U.S. 46, 51.

The New York Court of Cardozo, Pound and Crane felt a single occurrence was not the evil sought to be prohibited so an isolated incident was insufficient to sustain a conviction of unlawfully practicing law in violation of a statute. *People v. Goldsmith,* 249 N.Y. 536; *People v. Wiel,* 266 NYS 653. Here Petitioner did what any number of para legal aids would and could do in aid of an attorney. There was no evidence that the deeds or wills were drawn improperly or unusable.

In *Isserman,* 345 U.S. 292, Four (4) U. S. Supreme Court judges stated: "we do not recall any previous instance . . . where a lawyer has been disbarred by any Court of the United States or of a state merely because he had been convicted of a contempt."

Further, Petitioner submits he was niether disbarred nor reinstated under the Governing Rule V which was enacted after his infractions. There were no allegations or proof below that Petitioner's conduct was within purview of the rule. Hence a more cogent reason to refuse disbarment as there was no jurisdiction!

Lastly, the penalty for violation of a Court Order where an alternative remedy is available is "unnecessarily severe". In re *Sachar* 347 U.S. 388.

WHY THE WRIT SHOULD BE GRANTED

For the Petitioner this armageddon, the final battle in prolonged litigation over issues of due process. What acts were

complained of were not criminial nor did they involve moral turpitude yet in the case of an attorney the public thinks there was some crime or criminial conduct. For the disbarred, doors are closed, jobs are not available and as Lincoln wrote: "The tarnished lawyer becomes a homeless man." With suspension the door is left open to return to a chosen profession, the action here, if sustained, would bar the doors forever. A criminial can go to prison and find employment on release. A lawyer loses the right to use his skills or intelligence under this order forever. The harshness is readily seen. The Bar should be advised of this loss of rights. Aside from the personal elements the issue in this case presents the right of an indigent in adversary proceedings to counsel. The ruling here on a Constitutional issue will involve millions. All persons licensed in any area, real estate, vending, insurance and business will have transcendental Constitutional rights defined. The issue of due process in any type of hearing involving loss of license, business, reputation and property are affected. It is a matter of great general and public interest and one of novel interest that requires adjudication by this Court.

APPENDIX A

OHIO STATE BAR ASSOCIATION v. ILLMAN.

[Cite as Ohio State Bar Assn. v. Illman (1976), 45 Ohio St. 2d 159.]

(No. 75-4—Decided February 25, 1976.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Respondent, Harry R. Illman, was admitted to the Ohio Bar in 1943. He began his legal career in Toledo.

In October 1952, the Court of Common Pleas of Lucas County suspended him from the practice of law for a period of five years. Upon termination of the suspension respondent resumed his practice in Toledo. On May 21, 1969, this court entered an indefinite suspension order against respondent. (18 Ohio St. 2d 122.) Following respondent's application for reinstatement, on January 18, 1973, this court confirmed the recommendation of the board of commissioners and denied respondent's petition for reinstatement.

This court's suspension order, *supra*, mandated "that * * * [respondent] be forbidden to counsel or advise or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law." In instituting this proceeding, the Ohio Bar Association, relator, elected to proceed under the disciplinary procedures of Gov. R. V., rather than to seek a contempt citation for violation of this court's order.

Respondent's former clients, Mr. and Mrs. George Yaney testified that Illman contacted them by telephone in December 1973, and that the call was to discuss with them the advisability of revising their respective wills. Respondent discussed the wills at Yaney's home. The Yaneys followed Illman's recommendation that the wills be revised, and designated respondent as attorney for the executor in both wills. Respondent allegedly informed the Yaneys that his fee for preparing the will was

$160. A check for that amount was paid to Illman by George Yaney.

Respondent also advised the Yaneys that it would be to their best interest to execute new deeds to change their real estate holding to an estate by the entireties with survivorship. Respondent was authorized to prepare the new deeds. His fee for preparation of the deeds was allegedly $150. A check for that amount was paid to him by George Yaney.

Neither the wills nor the deeds were executed by the Yaneys.

Respondent admitted that he prepared the wills and the deeds. He claimed, however, that the $160 payment to him was for past legal services, a claim which was denied by the Yaneys.

Respondent, claiming indigency, requested that counsel be appointed to represent him. The record reveals that the complaint to instigate this proceeding was filed on April 3, 1974. The notice of filing complaint stated that respondent was required to file a written answer within 20 days after April 12, 1974. On May 1, 1974, respondent filed his answer. On August 12, 1974, the chairman of the board's hearing panel set the hearing for November 4, 1974. The board of commissioners received a motion from respondent on October 17, 1974, for appointment of counsel. This motion was overruled on October 28, 1974. Notice of such action was sent to respondent at his last known address, and returned by the postal authorities as undeliverable because respondent "moved." Upon a telephone call to the secretary of the board, respondent was notified of the board's decision and that the hearing would proceed on November 4, 1974, as originally scheduled.

The board recommended that respondent be disbarred from the practice of law in accordance with Gov. R. V. 5 (a).

Mr. John R. Welch, Mr. Albert L. Bell, Mr. Jack C. Harris and Mr. Harlan S. Hertz, for relator.

Messrs. Schwartz, Fisher, Spater, McNamara & Marshall, Mr. Theodore G. Fisher and Mr. Leonard J. Schwartz, for respondent.

Per Curiam. From a review of the record there is very little dispute as to evidence adduced before the board. Whether one of the two checks was paid by the Yaneys to respondent for present or past legal services is of no great significance. Respondent admitted preparing the deeds and the wills, and admitted receiving at least one check for such services. By no stretch of the imagination can the activity of the respondent be considered as paralegal or legal-intern services, as there was no semblance of compliance with the Ohio rules as to supervised limited practice of law by legal interns. See Gov. R. II, Section 2.

Respondent's admission that he prepared the instruments for the Yaneys is an admission that he violated this court's order of May 21, 1969.

Respondent's principal contention before the board was that during much of his life he was a "compulsive gambler," but now has disciplined himself through professional counselling and is no longer engaged in such activity. However that may be, "compulsive gambling" is no defense to an actual violation of an order issued by this court to a suspended attorney not to engage in the practice of law.

In his brief and oral argument to this court, respondent claims that the board's hearing panel denied him due process by failing to continue the hearing and appoint counsel to represent him at the hearing.

In *Ohio State Bar Assn.* v. *Weaver* (1975), 41 Ohio St. 2d 97, 100, this court held that "[t]he court's purpose in a proceeding [disciplinary] of this type is not to enforce the criminal code, but rather to investigate the conduct and fitness of one of its officers. These proceedings are neither civil nor criminal; they are instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed to practic law."

The primary function of disciplinary proceedings is investigatory, not accusarory or prosecutorial, and those proceedings

are neither civil nor criminal in nature. The standards of due process in such proceedings are not those in a criminal proceeding, nor does it seem to us a necessity of due process that a respondent, who has practiced as an attorney, be entitled as a matter of right to have counsel appointed for him. Furthermore, the record shows that respondent conducted his defense with adroit cross-examination and argued before the panel with logic and self-control.

Upon a review of the entire record, we find that the board's hearing panel did not abuse its authority in refusing to appoint counsel to represent respondent.

A summary of respondent's conduct since admission to the Bar of Ohio reveals two court-ordered suspensions from the practice of law, coupled with a violation of this court's order prohibiting respondent from practicing law.

We conclude, therefore, that respondent's misconduct requires his disbarment, and it is so ordered.

Judgment accordingly.

O'Neill, C. J., Herbert, Corrigan, Stern, Celebrezze and W. Brown, JJ., concur.

Paul W. Brown, J., dissenting. Because the board of commissioners denied a timely request by respondent for the assistance of legal counsel, I cannot join the majority opinion which disbars the respondent from the practice of law. The board's assertion, in its report to this court, that "[r]espondent *elected* to serve as his own attorney," is not supported by the record. (Emphasis added.)

Relator's complaint was filed with the board of commissioners on April 3, 1974. Notice of the filing was sent to respondent on April 10. On May 1, respondent filed an answer to the complaint, and a "motion to stay or consolidate." In that motion, respondent stated that he was undergoing "prolonged, extensive, and expensive psychoanalysis," and that he would be without sufficient funds to engage counsel until after January 1, 1975. Respondent stated further that he would be eligible to petition for reinstatement to the bar in January 1975,

and suggested consolidating the disciplinary and reinstatement proceedings.

On May 22, the motion to stay or consolidate was denied. Counsel for relator was instructed to make inquiry concerning respondent's mental condition. On August 5, in response to such inquiry, respondent by letter advised relator and the board, "* * * I am still unemployed and without funds for employment of counsel," and made inquiry as to the possibility of appointed counsel.

An August 12, without any action on respondent's request for counsel, the formal hearing on relator's complaint was scheduled for November 4, 1974.

On October 17, respondent filed a motion to set aside and vacate the hearing date, stating that he was in a state of severe depression, under the care of an analyst in the psychiatric department of the Ohio Medical College, and without funds to retain counsel. Respondent stated further that he had written to former counsel, had received no response, and "has waited until the present time in hopes of such response and that respondent is unwilling to force or impose himself on such counsel in this matter under such circumstances." On October 28, respondent's motion was overruled. Respondent did not receive written notice of that action until the morning of November 4.

On November 4, prior to the introduction of evidence before representatives of the board of commissioners, respondent renewed his request for appointed counsel. Respondent stated, in part:

"I would like to have the panel appoint counsel for me because I do not feel adequately mentally prepared to undertake my defense on this or any other matter and I will accept any counsel that you deem appropriate for the purpose of this hearing. This is a very important hearing and I think I should be represented by counsel and I don't feel that I could do so myself. This same matter would have a counsel appointed in a criminal case and this involves a professional life, loss of reputa-

tion, loss of income and so forth as well as humiliation and especially my mental condition it would be a horrendous burden to proceed without counsel in a case of this nature and so I would like counsel to represent me and I would like the record to show that I strenuously object to proceeding without adequate representation and I want the benefit of counsel at any hearing of this nature."

Respondent's request was again overruled, forcing him to conduct his own defense.

A proceeding to suspend a professional license must comport with the requirements of due process of law. *In re Ruffalo* (1968), 390 U. S. 544; *Spevack* v. *Klein* (1967), 385 U. S. 511. This court has never held that such a proceeding entitles a responding party to the assistance of counsel. In my judgment, however, "disbarment and the loss of professional standing, professional reputation, and of livelihood" *(Spevack, supra,* at page 516) are penalties at least as severe as those imposed in many criminal cases, where the assistance of appointed counsel is made available as a matter of course.

Where the need for the assistance of counsel is manifest, fundamental fairness dictates that one charged as was the respondent be assisted upon timely request. The entitlement should depend, not upon whether the respondent ought to be able to employ counsel, but whether he is in fact unable to employ counsel, by reason of indigency or otherwise. See *State* v. *Tymcio* (1975), 42 Ohio St. 2d 39. I would remand this cause to the board of commissioners, for a determination of respondent's entitlement to appointed counsel, and a rehearing on the merits of relator's complaint.

SC-18

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19..76.. TERM

To wit: March 19, 1976

Ohio State Bar Association,
Relator,

vs.

Harry R. Ilman,
Respondent.

No. DD 75-4

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 19th *day of* March, *19* 76

THOMAS L. STARTZMAN *Clerk.*

By Jean L. Johnson *Deputy.*

APPENDIX C

Governing Rule V, Subsection 7, effective February 28, 1972

(7) Effect of Discipline. A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

APPENDIX D

THE FEDERAL QUESTION

Petitioner, after overruling of his Motion for Reconsideration by the Ohio Supreme Court, filed a request in writing with the cover sheet therof entitled "Request For a Certificate To Show Federal Question". The first two paragraphs of such request provided as follows:

> "Respondent respectfully moves the Court for an Order to direct the Clerk of this Court to prepare and mail to Respondent a certificate for use on appeal from the order hereof that a federal question, that is denial of due process, among others, was an issue raised, argued and presented in trial hereof.
>
> Respondent respectfully represents that prior to the taking of any evidence hereof, he complained that being "forced" to proceed without counsel was a denial of due process under the Constitution. The dissenting opinion corroborates such argument made in the record. Since the federal question should be clearly shown on appeal to the U. S. Supreme Court, this request is made for such purpose."

It was this request that was denied in the Order following herewith.

SC-8 (BLANK ENTRY)

THE STATE OF OHIO,
City of Columbus.

19 76 TERM

Ohio State Bar Association,
Relator,

To wit: April 28, 1976

No. DD 75-4

vs.

Harry R. Illman,
Respondent.

E N T R Y

Upon consideration of the motion, filed by respondent, for a certificate to show federal question, it is ordered by the court that this motion be, and the same hereby is, denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th *day of* April *19*76

THOMAS L. STARTZMAN *Clerk.*

By Dana L. Jacino *Deputy.*

CERTIFICATE OF SERVICE

STATE OF OHIO)
) SS: **AFFIDAVIT**
COUNTY OF LUCAS)

Harry R. Illman, being first duly sworn upon oath deposes and says that he is the Petitioner and Affiant herein; that Affiant has prepared the brief in this writ himself and is appearing in his own behalf, pro se, that he is not a member of the Bar of this Court; that pursuant to Part VIII Rule 33 of the Rules of the Supreme Court of the United States Affiant made service of a copy of the brief hereof by mailing by certified mail true copies of the same to the Ohio State Bar Association Attorneys at the address listed on the cover page herein, by accordance with Rule 33 (1) thereof. Affiant states that such mailing was made on the 11th day of May, 1976; that on the same date 40 copies of the brief herein was mailed to the Clerk of this Court.

Affiant further sayeth not.

Harry R. Illman
HARRY R. ILLMAN

Sowrn to before me and subscribed in my presence this day of May, 1976.

KATHLEEN R. HORRIGAN
Notary Public, Lucas County, Ohio
My Commission Expires Oct 10, 1976

Kathleen R. Horrigan
Notary Public, State of Ohio

Supreme Court, U. S.
FILED
JUL 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

October Term 1975

No. 75-1669

HARRY R. ILLMAN,

Petitioner,

vs.

OHIO STATE BAR ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Pages
Statement	1
Questions Presented	4
Argument	4
Conclusion	8
Certificate of Service	9

APPENDIX A

Rule V Disciplinary Procedure —

29 Ohio St. 2d XXIX	10
Paragraph (5) (a) Misconduct—Definition	15
Paragraph 6—Manner of Discipline	16

Cases

Cleveland Bar Assn. v. Pleasant. 167 Ohio St. 325-335, 148 NE 2d 493, cert. den. 385 U.S. 842, 3 L. Ed. 2d 76	7
Selling v. Radford, 243 U.S. 47-48; 61 L. Ed. 586-587	8
Herb v. Pitcairn, 324 U.S. 117-125-6	8

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This case concerns an order of the Court below disbarring Petitioner from the practice of law in Ohio.

Petitioner concedes that "The salient facts are apparent from the opinion of the lower court and can be readily stipulated." (Petitioner's Brief p. 2). We agree. However, Petitioner's statement that "Respondent filed a complaint in *contempt* under Governing Rule V rather than seek a contempt citation for violation of the Court order", (Petitioner's Brief p. 3), is not correct and not in accord with the facts found by the Court below. The proceedings in the Court below were disciplinary proceedings, not proceedings in contempt. Furthermore, these proceedings were filed under Governing Rule V, paragraph (5) (a) and not

paragraph 7. Governing Rule V (5) (a) defines misconduct in pertinent part as,

> "Misconduct shall mean * * * disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, * * *."

It is also incorrect to state (Petitioner's Brief p. 7) that Governing Rule V was enacted after his infractions. Insofar as we are concerned here, Governing Rule V is precisely the same as former Rule XVIII of the Court below which became effective March 11, 1964. (See 20 Ohio St. 2d p. XXXVII and XXXIX — Rules of Practice.)

There is also a misstatement of fact in the second Question Presented. (Petitioner's Brief p. 2) There was no finding of fact in the Court below that Petitioner was "acting under the direction of another lawyer" when he prepared wills and deeds for his former clients.

The Court below found the facts to be as follows:

> "Respondent, Harry R. Illman, was admitted to the Ohio Bar in 1943. He began his legal career in Toledo
>
> "In October 1952, the Court of Common Pleas of Lucas County suspended him from the practice of law for a period of five years. Upon termination of the suspension respondent resumed his practice in Toledo. On May 21, 1969, this court entered an indefinite suspension order against respondent. (18 Ohio St. 2d 122.) Following respondent's application for reinstatement, on January 18, 1973, this court confirmed the recommendation of the board of commissioners and denied respondent's petition for reinstatement.

> "This court's suspension order, *supra*, mandated 'that * * * (respondent) be forbidden to counsel or advise or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law.' In instituting this proceeding, the Ohio Bar Association, relator, elected to proceed under the disciplinary procedures of Gov. R. V., rather than to seek a contempt citation for violation of this court's order.
>
> "Respondent's former clients, Mr. & Mrs. George Yaney testified that Illman contacted them by telephone in December 1973, and that the call was to discuss with them the advisability of revising their respective wills. Respondent discussed the wills at Yaney's home. The Yaneys followed Illman's recommendation that the wills be revised, and designated respondent as attorney for the executor in both wills. Respondent allegedly informed the Yaneys that his fee for preparing the will was $160. A check for that amount was paid to Illman by George Yaney.
>
> "Respondent also advised the Yaneys that it would be to their best interest to execute new deeds to change their real estate holding to an estate by the entireties with survivorship. Respondent was authorized to prepare the new deeds. His fee for preparation of the deeds was allegedly $150. A check for that amount was paid to him by George Yaney.
>
> "Neither the wills nor the deeds were executed by the Yaneys.
>
> "Respondent admitted that he prepared the wills and the deeds. He claimed, however, that the $160 payment to him was for past legal services, a claim which was denied by the Yaneys.
>
> "Respondent, claiming indigency, requested that counsel be appointed to represent him. The

record reveals that the complaint to instigate this proceeding was filed on April 3, 1974. The notice of filing complaint stated that respondent was required to file a written answer within 20 days after April 12, 1974. On May 1, 1974, respondent filed his answer. On August 12, 1974, the chairman of the board's hearing panel set the hearing for November 4, 1974. The board of commissioners received a motion from respondent on October 17, 1974, for appointment of counsel. This motion was overruled on October 28, 1974. Notice of such action was sent to respondent at his last known address, and returned by the postal authorities as undeliverable because respondent "moved." Upon a telephone call to the secretary of the board, respondent was notified of the board's decision and that the hearing would proceed on November 4, 1974, as he originally scheduled.

"The board recommended that respondent be disbarred from the practice of law in accordance with Gov. R. V. 5 (a)."

QUESTIONS PRESENTED

1. Does the denial of a timely request for counsel by an indigent in a disciplinary or contempt proceeding constitute denial of "due process of law" within the purview of the Fourteenth Amendment?

2. Is the mere preparation of an unexecuted will and a deed by a suspended attorney, acting under direction of a lawyer, conduct malum in se to warrant an order of disbarment therefor; or does such order violate "due process of law" provisions of the United States Constitution?

ARGUMENT

This case presents the issue whether the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, is required under the due

process clause of the Fourteenth Amendment of the United States Constitution to furnish counsel to an alleged indigent lawyer under investigation for alleged misconduct in proceedings before the Board.

The Court below holds that it is not so required because,

> "The primary function of disciplinary proceedings is investigatory, not accusatory or prosecutorial and those proceedings are neither civil nor criminal in nature. The standards of due process in such proceedings are not those in a criminal proceeding, nor does it seem to us a necessity of due process that a respondent, who has practiced as an attorney at law, be entitled as a matter of right to have counsel appointed for him. Furthermore, the record shows that respondent conducted his defense with adroit cross-examination and argued before the panel with logic and self-control." (Decision of the Court below, Petitioner's Brief p. 11-12.)

I. THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

For an understanding of disciplinary proceedings in the Court below, we briefly summarize that procedure. (The full text of Ohio Disciplinary Procedure may be found in Appendix A)

Since January 1, 1957, lawyer disciplinary proceedings in Ohio have been under the exclusive jurisdiction of the Supreme Court.

Pursuant to its Rule V (formerly numbered Rule XVIII and Rule XXVII) the Court below put investigation of charges of misconduct against lawyers in the hands of a Board of Commissioners on Grievances and Discipline (hereinafter called the Board) consisting of 17 lawyers appointed by the court.

Under Rule V, charges of misconduct against a

lawyer are filed by a bar association with the Board. The Board notifies the lawyer of the charges and requests his answer. Upon the filing of the lawyer's answer, a panel of three members of the Board is appointed by the Chairman of the Board to hear evidence on the charges and the lawyer's defenses. The panel sets a date for the hearing and notifies the parties. In this case, the parties were notified August 12, 1974, that the hearing was set for November 4, 1974.

It was at this stage in the proceedings, on October 17, 1974, that Petitioner requested the hearing panel to furnish him counsel and was denied.

At the conclusion of the evidentiary hearing, the panel makes findings of fact and recommendations on discipline to the Board. The Board reviews the entire proceedings, and makes its findings of fact and recommendation to the Supreme Court, and files the complete record of the proceedings in the Supreme Court. The Board notifies the parties of its findings of fact and recommendation.

The Court below then issues an Order to the lawyer to Show Cause why the findings and recommendation of the Board shall not be confirmed.

That is the exact procedure followed in this case.

It was at this stage in the proceedings, that is, in response to the Order to Show Cause, that Petitioner employed counsel of his own choosing who presented written and oral argument to the Court below in behalf of Petitioner. (Petitioner's Brief p. 3)

It will be observed from the above summary of the proceedings before the Board, that neither the Board nor its hearing panels have adjudicatory powers; neither the Board nor its panels issue orders or make

any determination which will affect the legal rights of the lawyer. Their function is to hear the evidence and to make findings of fact and recommendations to the Court below, and that is all they do.

It is the Court below that has sole responsibility for determining what the facts are and what action should be taken on those facts. *Cleveland Bar Assn. v. Pleasant* (1958) 167 Ohio St. 325-335, 148 NE 2d 493, cert. den. 385 U. S. 842, 3 L. Ed 2d 76, wherein the court said:

> "There can be no question now of the inherent power of this court as to the disciplining of attorneys, and, therefore, of its power to provide by rule the procedure in reference to hearings upon such questions. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline. Such Board or its panels have no power to discipline an attorney except with reference to a private reprimand, and surely that can not constitute a judgment, for the power to give such a reprimand would be inherent without any authorization by this court. *As to any other disciplinary action, all that the board can do is to investigate and make findings of fact and recommendations, and the only order or decision is made solely by this court.*" (Emphasis supplied.)

With respect to the issue sought to be raised here, that the Court below was required to furnish Petitioner counsel at government expense, it will be observed that Petitioner had the assistance of counsel of his own choosing in the hearing before the Court below which has exclusive power to determine what the facts are and the action to be taken on those facts. Surely, in a case such as this one, where all relevant facts are admitted, due process does not require more.

II. THE JUDGMENT OF THE COURT BELOW RESTS ON ADEQUATE AND INDEPENDENT NON-FEDERAL GROUNDS.

All of the facts relevant to a determination on the merits by the Court below are admitted by the Petitioner. (Petitioner's Brief p. 2; Decision of Court Below, Petitioner's Brief p. 10-11.)

Therefore, without regard for the issue sought to be raised by Petitioner, the facts in this case will not change, nor will the decision of the Court below on those facts.

Disbarment being a matter within the sound judicial discretion of the Court below, it is not reviewable here. *Selling v. Radford*, 243 U. S. 47-48; 61 L. Ed 586-587.

In *Herb v. Picairn*, 324 U. S. 117-125-6, this court said in regards to review of state court judgments:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief has been mailed by first class mail with postage prepaid to Harry R. Illman, Pro Se, 2210 Stirrup Lane Apt. K-7, Toledo, Ohio 43613.

JOHN R. WELCH
Attorney for Respondent

APPENDIX A

RULE V.
DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) **Creation of Board of Commissioners on Grievances and Discipline.** There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: District 1, comprising Butler, Clermont, Clinton, Hamilton and Warren Counties. District 2, comprising Darke, Miami, Montgomery, Preble and Shelby Counties. District 3, comprising Defiance, Fulton, Hancock, Henry, Paulding, Putnam, Van Wert, Williams and Wood Counties. District 4, comprising Lucas County. District 5, comprising Crawford, Delaware, Marion, Morrow, Ottawa, Sandusky, Seneca and Wyandot Counties. District 6, comprising Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties. District 7, comprising Franklin County. District 8, comprising Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pickaway, Pike, Ross, Scioto and Vinton Counties. District 9, comprising Coshocton, Fairfield, Knox, Licking, Muskingum and Perry Counties. District 10, comprising Ashland, Erie, Holmes, Huron, Lorain, Medina, Richland and Wayne Counties. District 11, comprising Portage and Summit Counties. District 12, comprising Cuyahoga County, District 13, comprising Ashtabula, Columbia, Geauga, Lake, Mahoning and Trumbull Counties. District 14, comprising Carroll, Stark and Tuscarawas Counties. District 15, comprising Belmont, Guernsey, Harrison, Jefferson and Monroe Counties. District 16, comprising Allen, Auglaize, Hardin and Mercer Counties. District 17, comprising Athens, Hocking, Meigs, Morgan, Noble and Washington Counties. The term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment. Provided, however, that any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1, of the preceding year. Vacancies for any cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners and designate a Secretary, each of

whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof.

(2) **Jurisdiction of Board.** The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court as hereinafter provided:

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court or a breach of these rules but did not take place in the presence of the court or a member thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of this

Court to impose punishment with reference either to contempts or breaches of of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(3) **Referral for Investigation.** The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association any matters coming to its attention for investigation, as hereinafter provided.

(4) **Application of Rule; Authority and Duty of Local Committees.** From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Any committee authorized by any regularly organized bar association or by the Ohio State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where misconduct, contempt, or mental illness is found; provided,

however, that nothing herein shall effect disciplinary procedures of any regularly organized bar association under the provisions of its constitution not inconsistent with this rule.

The Board of Commissioners or any member thereof, the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, and the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State may call upon any attorney and counselor at law or judge in the State to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such attorney and counselor at law or judge shall neglect or refuse so to assist in any such investigation or so to testify.

In the event that a Grievance Committee of a local bar association or the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association shall in the case of a disciplinary investigation as provided for in this rule seek determination of a procedural question, the principal officer of a local bar association or the Chairman of its Grievance Committee or the Chairman of the appropriate state bar association committee shall direct a written inquiry to the Chairman of the Board of Commissioners by filing it with the secretary

of the Board. Upon receipt of such written request, the Chairman of the Board of Commissioners may refer the inquiry to a panel of three members of the Board. The written request shall be documented with such facts, citations, statutory references and other written data that may be of assistance to make a determination of the matter presented. After the panel has completed its study of the problem presented, the panel shall make a written recommendation as to solution of the question. Upon receipt of such report and recommendation, the Chairman of the Board of Commissioners shall promptly convene the members of the Board who shall approve, reject, modify or otherwise dispose of the panel's recommendation. In the event that the question presented requires immediate attention for decision, the Chairman of the Board has the discretionary power to waive reference of the question to a panel, but shall submit the question or questions presented to the entire Board for its decision.

(5) **Definitions.**

(a) **Misconduct.** Misconduct shall mean any violation of any provision of the oath of office taken upon admission to the practice of law in this State, or any violation of the Code of Professional Responsibility or the Canons of Judicial Ethics as adopted by the Court from time to time, disobedience of these rules or of the terms of an order imposing a suspension for an indefinite

period from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(b) **Mental Illness.** Mental illness shall mean the condition defined in R. C. 5122.01(A).

(6) **Manner of Discipline.** Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or,

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or,

(c) a public reprimand, or

(d) a private reprimand.

(7) **Effect of Discipline.** A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this State. A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

(8) **The Complaint; Where Filed; By Whom Signed.** A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary, or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

(9) **Duty of the Board Upon Filing of the Complaint.**

(a) **Notice to Respondent.** The Secretary of the Board of Commissioners shall send a

copy of the complaint by registered mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint.

(b) **Suspension of Right to Practice Pending Disposition of Misconduct Complaint.** After an answer has been filed or the time for answer has elapsed, the Court shall entertain such recommendation as the Board may make for the immediate suspension from the practice of law pending disposition of the complaint if the complaint alleges the conviction of a crime involving moral turpitude supported by the certified copy of the judgment entry of the Court convicting the Respondent.

(c) **Mental Illness Suspension.** After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (d) hereof, The Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

(d) **Examination.** If the complaint or answer alleges existing mental illness unsupported

by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(e) **Termination.** Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(10) **Hearing by Panel of Three Commissioners.** After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constiute a quorum for all purposes.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall

be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(11) **Authority of Panel; Dismissal or Private Reprimand.** If the panel finds that the complaint or evidence is insufficient to base a charge of misconduct or that the complaint or evidence supports a charge of misconduct for which a private reprimand should be administered, the panel may order that the complaint be dismissed or administer such private reprimand at the time of the hearing. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, the Ohio State Bar Association, and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.
If a written request for a conference with the Supreme Court of Ohio is made by the Relator within twenty (20) days after the issuance of such notice, Relator, Respondent and a member of the hearing panel will be called to confer with the Court.

(12) **Referral by Panel.** In the alternative, if the panel determines that findings of fact and recommendations for dismissal or private reprimand should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal or private reprimand in

the same manner as provided in the following sections of this Rule V with respect to public reprimand, suspension or disbarment.

(13) **Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel.** If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, suspension for an indefinite period, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) **Review by Entire Board of Commissioners; Board to Administer Private Reprimand.** Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Sec-

retary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) **Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review.** If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

(16) **Show Cause Order Issued by the Court to Respondent.** On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

(17) **Response to Order to Show Cause and Objections.** The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

(18) **Answer Briefs.** Answer briefs together with proof of service shall be filed within fifteen (15) days after briefs in support of objections have been filed. All briefs shall be filed in the number and form required by rules of this Court for original actions.

(19) **Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order.** After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local bar association or as-

sociations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

(20) **Proceedings Private; Exceptions.** All proceedings and documents relating to complaints and hearings thereon and proceedings in connection therewith shall be private except:

(a) Where the Respondent shall request in writing that they be public or

(b) Where proceedings filed with the Supreme Court of Ohio recommend the discipline of permanent disbarment or suspension for an indefinite period, or

(c) Where any disciplinary matter is heard by the Supreme Court of Ohio, other than in conference, on objections to the findings or recommendations of the Board of Commissioners.

(A copy of the findings, recommendations and actions of the Panel and the Board of Commissioners in each case shall be given to any member of the Court upon request.)

(21) **Petition for Reinstatement.** No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(22) **Contents of Petition for Reinstatement.** Subject to the foregoing restrictions, any person who has been suspended for an indefinite period from the practice of law and who wishes to be reinstated may file his verified petition and twenty (20) copies thereof with the Clerk of this Court, setting forth

(a) the date when such suspension was ordered, and if there was a reported opinion, the volume and page of the official reports of this Court where such opinion appears;

(b) the dates all such prior petitions for reinstatement were filed, denied or granted;

(c) the names of all persons and organizations, except the Petitioner and the Board of

Commissioners, who were, or would be, entitled, under this Rule, to receive from the Clerk of this Court certified copies of the disciplinary order of this Court against Petitioner resulting in his suspension; and the name of the local bar association or associations in the County in which he resides at the time of the filing of the Petition and of each County in which he proposes to maintain an office if reinstated; and

(d) the facts upon which he relies to establish by clear and convincing evidence that he possesses all the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, nothwithstanding the previous disciplinary action taken against him.

(23) **Costs to be Deposited with Petition for Reinstatement.** Such petition shall be accompanied by a deposit in an amount to be fixed by the Clerk, for probable costs and expenses to be incurred in connection with said proceedings, which shall include any amounts unpaid under any prior order of this Court.

(24) **Requisites for Reinstatement.** No person shall be reinstated unless he has established by clear and convincing evidence that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio

at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule I of the Supreme Court Rules for the Government of the Bar of Ohio shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) **Petition for Reinstatement Referred to Board of Commissioners.** Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) **Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners.** The Chairman of the Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom

shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22)(c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

The hearing panel shall make and certify a report of the proceedings before it, including its findings of fact and recommendations, to the Board of Commissioners; and all proceedings before such panel and the Board of Commissioners shall, whenever appropirate, be governed by the provisions hereinbefore contained governing disciplinary proceedings, including proceedings in this Court or an issuance of an order to show cause why the final report of the Board of Commissioners should not be confirmed.

The Board, in its discretion, may recommend that the Petitioner be required to take and pass one of the regular bar examinations as a condition of readmission. If the final report should recommend denial of the petition, the Petitioner shall have ten (10) days from receipt of notice of the date of filing such report to file objections thereto and brief in support thereof. If the final report should recommend granting

of the petition any person or organization referred to in Section (22)(c) shall have ten (10) days from the receipt of notice of filing of such report to file objections to the recommendations and brief in support thereof. The Court shall thereupon enter an appropriate order, which may include such provisions for reimbursement of the costs and expenses incurred in connection with the proceedings as the Court shall deem just.

(27) **Manner of Service of Notices, etc.** Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

(28) **Quorum of Panel or Board.** A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

(29) **Clerk is Agent for Service of Notices on Nonresident Attorney.** Any nonresident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counselor at law by the rules of this Court, who subsequently be-

comes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counselor at law or judge, pursuant to this Rule.

(30) **Manner of Service on Clerk; Record of Such Service Not a Public Record.** All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a like, true and attested copy, with an endorsement thereon of the service, upon said Clerk of this Court, addressed to such Respondent at his last known address. The Postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

(31) **Power to Issue Subpoenas.** In investigations and proceedings under this rule, upon application by the Chairman, Vice Chairman, Secretary, or Counsel of the Committee of Legal Ethics and Professional Conduct of the Ohio State Bar Association, or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state authorized to sign a certificate under Section (8) hereof, or by the Respondent or Relator, each member of the Board of Commissioners and its Secretary shall have power to issue subpoenas and to cause testimony to be taken under oath before the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association, or any subcommittee thereof, or before the Grievance Committee of any regularly organized local bar association in the State, or before a hearing panel of the Board of Commissioners. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners or its Secretary and served as provided by statute.

(32) **May Order Depositions.** The Secretary of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

(33) **Effect of Refusal to Testify.** The refusal or neglect of the person subpoenaed as a witness to

obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

(34) **Rules of Evidence.** All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

(35) **Docket of Complaints.** The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

(36) **Board May Prescribe Rules.** The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

(37) **Rule to be Liberally Construed.** The process and procedure under this Rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This Rule and such regulations relating to investigations and proceedings involving complaints of misconduct and petitions for rein-

statement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the amendment of this Rule. To the extent that application of this amended Rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended Rule became effective shall continue to apply.

Supreme Court, U. S.
FILED
AUG 2 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1669

HARRY R. ILLMAN

Petitioner

vs.

OHIO STATE BAR ASSOCIATION

Respondent

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

	Page
In Re Gault, 387 U.S. 1	3
*Glasser v. U.S.*315 U.S. 60	2,3
Lessard v. Schmidt, 349 F. Supp. 1078	3
In Re Popp, 35 O.S.2d 142	2
Willner v. Committee, 373 U.S. 96	3

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PETITIONER'S REPLY BRIEF

Petitioner concedes the argument that State Court have always had inherent power to enforce its own laws, rules, or regulations, which includes the right to discipline attorneys admitted to its Bar. Human nature, being what it is, there will always be censors, critics, and/or the over-zealous seeking to exercise power or authority. The Bar alone policies itself. Inherent in the power to punish is the power to destroy. Those who would exercise police powers could run rampant, unrestrained, and unreproved, unless curbed or restricted by the force of law. Petitioner calls upon this Court to police those who would police becuase there is no where else to turn. If this was not true, a form of anarchy would ensue. In policing whatever police powers or disciplinary powers etc., of whatever type in proceedings below, (civil, criminal, quasi-criminal, investigatory) the nature of the proceedings are guided by a general admonition from this court of long standing, i.e., the limitations of the Fourteenth Amendment, due process or fundamental fair play. If due process is accorded, the action can be upheld, otherwise not. To strike down and destroy a man in his chosen profession, without counsel when requested, is denial of due process.

Here, there is no denial of the salient facts in the Bar reply. To argue such facts would have necessitated repetition and the same would be emphasized rather than explained away, but the deplorable record stands as previously represented herein. Petitioner made a timely request for counsel on the basis of illness and financial inability to proceed in a proceeding which would make him sicker. There was no evidence that a continuance would be harmful or prejudical until counsel was obtained. This issue is not only the right of appointment of counsel as in criminal cases, but determination of such right where indigent as the dissent argues, or for a continuance to obtain counsel. The question being: does one, regardless of financial ability, have a right to request lawyering services when his back is to the wall? It is not disputed that five attorneys appeared for the Bar while defendant stood alone. The record is clear that a protest of being forced to proceed was claimed as denial of due process.

The Panel is the fact finding body of the Ohio Court. Assistance of Counsel before that Panel is essential in making a record for a Court of Review. The failure to protect such right in the first instance is error which is not cured by review before the Ohio State Court for the reason that that Court can only pass on fact adduced before the Panel. Presence of Counsel could have materially altered or marshalled the tacts for a more beneficial result. It can never be said as a matter of law that absence of assistance helped Petitioner. This court stated it more succinctly in syllabus 11 of *Glasser vs. U.S.*, infra. The Bar answer in fact multiplies the grievous errors, rather than mitigate them. The obvious does not require extended arguements!

Rule V (a) defines misconduct while sub-section (7) imposes a penalty. The two sections are in pari materia and must be construed together. How could punishment under (7) be applied to Petitioner never disbarred or reinstated as in such rule? Is this due process?

Petitioner takes the liberty of bringing additional authorities to the attention of this Court in argument to display the incongruous position taken by the Court below.

The Supreme Court of Ohio considered the right of an indigent to appointed counsel in commitment proceedings

(mental) in *Re Popp*, 35 O.S. 2d. 142 (1973). Since the patient was released, the issue became moot; this issue was not resolved yet Justice Brown, writing the dissent below and Chief Justice O'Neill dissented. As to whether the Chief Justice compromised his judicial integrity in Popp to avoid adverse ramifications of reasonable differences (Ruffalo) is an intriguing question. If so, then there should have been a 5-2 vote herein in the Court below.

Further authorities supplement the issues raised. *In re Gault*, 387 V.S. 1 held a juvenile was entitled to assistance of counsel in delinquency proceedings (civil) as a requirement of due process.

Lower Federal Courts have held there is a right to counsel in commitment proceedings. See *Lessard v. Schmidt* 349. F. Supp. 1078.

Willner v. Committee 373 U.S. 96.

Sub-syllabus (a) The issue presented is justiciable, since the claim of present right of Admission to the Bar of a State and denial of that right is a controversy. p. 102.

(b) The requirements of procedural due process must be met before a State can exclude a person from practicing law. p. 103.

Glasser v. U.S. 315 U.S. 60. The applicable syllabus:

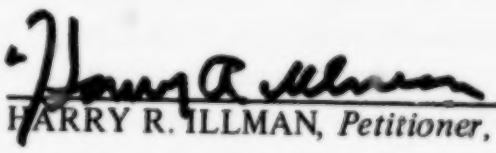
8. Every reasonable presumption is indulged against a waiver of fundamental rights such as the right of the accused to have the full and untrammeled assistance of counsel in the trial of a criminal case. p. 70.

9. The fact that a defendant in a criminal case is an experienced lawyer may be a factor in determing whether he waived his right to assistance of counsel, but it is not conclusive. p. 70. Here petitioner claimed he was "forced" to proceed.

10. The trial judge should protect the right of an accused to have assistance of counsel. p. 71.

11. The right to have the assistance of counsel is too fundamental to be made to depend upon nice calculations by courts of the degree of prejudice from its denial. p. 76.

All the foregoing are reduced to sententious cliches if certiorari is denied. The scope of this case is the right to a lawyer where a re uest is timely made or the right to a continuance until a law er is secured. The problem affects and is common to all. Everybody should be entitled to a lawyer on request. Certiorari must issue. Please.



HARRY R. ILLMAN, *Petitioner, Pro Se*

CERTIFICATION

The undersigned hereby certifies that five copies of the foregoing brief has been mailed by first class mail with postage prepaid to John R. Welch, Albert L. Bell, Jack C. Harris, Harlan S. Hertz c/o Ohio State Bar Association, 33 West 11th Avenue, Columbus, Ohio 43201, this day of July 1976.

HARRY R. ILLMAN, *Petitioner, Pro Se*